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No. 02-397

IN THE

Supreme Court of the United States

DELOITTE & TOUCHE LLP, *et al.*,

Petitioners,

v.

GABRIEL DiRIENZO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The issue raised by the Petitioners is whether the decision of the United States Court of Appeals for the Second Circuit in this case "conflicts with this Court's *forum non conveniens* jurisprudence and the law of ten other circuits." Petition ("Pet.") at 1. However, the Second Circuit opinion does not hold what Petitioners claim it holds. Rather, the Second Circuit opinion assiduously and consistently applied the *forum non conveniens* method of analysis established by this Court. Nor is the ruling below in conflict with any decision of the other circuit courts.

The Second Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

I. Factual and Procedural Background

These consolidated securities class actions, originally filed in February 1998, allege violations of the federal securities laws against Philip Services Corp. ("Philip" or the "Company"),[1] several of Philip's officers and directors, Deloitte & Touche LLP ("Deloitte") (the Company's outside auditor) and several investment banks (the "Underwriter Petitioners"). Philip purported to be, at all relevant times, "an integrated resource recovery and industrial services company, which provides metal recovery and processing services, by-products recovery and industrial services to major industry sectors throughout North America." Appendix C, p. 78a.[2] The Company maintained headquarters in Pittsburgh, Pennsylvania and Ontario, Canada. *Id.*

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1. On June 25, 1999, Philip filed for protection under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Thereafter, Respondents and Philip agreed to settle the claims asserted against it through the Bankruptcy Court proceedings. Therefore, Philip was not a party to the appellate proceedings below.

2. References to "Appendix" are to the Appendix to the Petition For A Writ of Certiorari.

During the Class Period,[3] Philip's stock traded on the New York Stock Exchange (the "NYSE"), the Toronto Stock Exchange and the Montreal Stock Exchange. Prior to April 30, 1996, Philip stock traded on the NASDAQ. *Id.* Nearly 80% of all Philip shares traded during the Class Period were traded on exchanges in the United States. Appendix B, p. 26a.

Philip's business plan called for dominating the United States market for resource recovery and industrial services; between 1992 and 1997, Philip substantially expanded its revenue base, range of services and network of facilities throughout North America. Appendix C, p. 78a. The United States served as Philip's primary base of operations during the Class Period and its physical presence here was substantial: operational facilities in 12 states and the acquisition of 15 United States companies during the Class Period. For example, in 1997, Philip acquired two United States-based corporations — Allwaste, Inc. ("Allwaste") and Serv-Tech, Inc. ("Serv-Tech") — in stock-for-stock deals worth a total of approximately $560 million. Appendix C, p. 78a. In connection with the acquisitions of Allwaste and Serv-Tech, Philip filed registration statements with the U.S. Securities and Exchange Commission (the "SEC"). Appendix C, p. 79a. Philip also filed numerous other filings with the SEC. Seventy percent of the Company's revenues were generated in the United States. Appendix B, p. 24a.

Capitalizing on its attractive nexus with the United States, in November 1997, Philip completed two secondary public offerings, which together raised approximately $380 million. Appendix C, p. 78a. One offering, made exclusively to investors in the United States by seventeen United States-based investment banks, raised approximately $284 million pursuant to a Registration Statement filed with the SEC (the "November 1997

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3. Respondents assert claims on behalf of: a class of all persons who purchased Philip common stock and call options during the period from February 28, 1996 through May 7, 1998 (the "Class Period") and on behalf of two Sub-Classes related to registered offerings or exchanges for Philip stock in the United States.

Offering"). Appendix C, pp. 78a-79a. The other offering, which raised approximately $94 million, was made only to investors outside the United States, and was underwritten by eight Canadian securities firms (the "Canadian Underwriters").[4] Appendix C, p. 79a.

Just over two months after the public offerings, on January 26, 1998, Philip announced that it would take "charges to earnings" for fiscal year 1997 of between $250 and $275 million. Appendix C, p. 79a. Over the next several months, this figure was raised to over $381 million, of which $125 million was reported to arise from overstated copper inventory and unrecorded copper-trading losses. *Id.* Philip also restated its previously issued financial statements for fiscal years 1995, 1996 and 1997. *Id.*

The restated financial statements disclosed that 1995 earnings had been overstated by approximately $22.5 million, or 690%, and that 1996 earnings had been overstated by $48.3 million. Appendix C, p. 79a. Instead of posting a $28.4 million profit in 1996, as Philip had initially reported, the Company recorded losses totaling approximately $20 million. *Id.* As a result of these disclosures, the share price of Philip stock dropped sharply, from $13 1/8 on January 16, 1998 to $2 9/16 in July 1998, a decline of approximately 80%. *Id.*

After these disclosures, more than 20 class action lawsuits were commenced in the United States District Courts for the Southern District of New York, the Western District of Pennsylvania, and the District of New Jersey. Appendix C, p. 80a. By Order dated June 2, 1998, these actions were transferred to the Southern District of New York by the Judicial Panel on Multidistrict Litigation (the "JPML") and the actions were subsequently consolidated for pre-trial purposes. Appendix C, p. 80a.[5]

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4. Purchasers in the non-United States offering are *not* members of the Class.

5. In June of 1998, several months after the class actions were commenced in the United States, a class action complaint was filed in (Cont'd)

The United States District Court for the Southern District of New York (the "District Court"), by Order dated July 23, 1998, appointed several individuals and one investment company to act as Lead Plaintiffs[6] (the "Respondents") pursuant to Section 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B).[7] Respondents suffered substantial losses on their investments in Philip common stock both collectively and individually. For example, Lead Plaintiffs Toll and Gans — both

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(Cont'd)
the Ontario Superior Court on behalf of residents of Canada who purchased Philip shares through the international secondary offering in November 1997 and on the Toronto and Montreal Stock Exchanges (the "Menegon Action"). Named as defendants in the Menegon Action are Philip, Deloitte and the Canadian Underwriters responsible for the Canadian offering (who are not defendants in this action). None of Philip's individual officers and directors is named as a defendant in the Menegon Action. Appendix C, p. 79a-80a.

6. The Lead Plaintiffs are: Gabriel DiRienzo, Carol F. Brink, William R. Brink, Robert Gans, Bruce E. Toll, Walter Chompski, Bradwal Investments, LTD, Deborah Mieczkowski, Robert W. Hillger, Gregory Mappus, Albert Solkov, Michael Isaacs and Sophia Isaacs.

7. The PSLRA requires district courts to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . .". 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA contains a presumption that the most adequate plaintiff is the person or group of persons who has the "largest financial interest in the relief sought by the class" and who "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78(u)-4(a)(3)(B)(iii)(I). Congress enacted the PSLRA, in part, to address the perception that securities class action litigation was largely "lawyer-driven." H.R. Conf. Rep. No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730; S. Rep. No. 104-98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679. Indeed, one of the purposes of the PLSRA was to enable investors with significant losses to control the course and conduct of the litigation to align more closely the interests of significant shareholders with those of the Class members. *Id.*

residents of the United States — invested more than $6.4 million and $3.5 million in Philip, respectively, investments which have become essentially worthless as a result of the fraud. Collectively, the Lead Plaintiffs invested over $12 million in Philip common stock. Notably, Lead Plaintiffs Gans and DiRienzo reside in the Southern District of New York.

On September 11, 1998, the Respondents filed their Consolidated Amended Class Action Complaint (the "Complaint" or "¶ __"), alleging violations of: (1) Sections 10(b) and 20 of the Exchange Act, 15 U.S.C. § 78j(b); 78t; (2) SEC Rule 10b-5, 17 C.F.R. § 240.10b-5; and (3) Sections 11, 12(a) and 15 of the Securities Act, 15 U.S.C. § 77k, 77*l*(a)(2), 77o. Appendix C, p. 80a. Respondents charged Philip and certain of its officers and directors with making materially false and misleading statements concerning its publicly reported revenues, earnings, assets and liabilities. *Id.*

Respondents also asserted claims against Deloitte in connection with its audits of Philip's financial statements for fiscal years 1995 through 1997. Appendix C, p. 80a. Deloitte, a member of Deloitte Touche Tohmatsu, a worldwide organization of affiliated accounting firms headquartered in New York City, issued unqualified opinions on Philip's 1995, 1996 and 1997 year-end financial statements. Appendix A, p. 7a. The Complaint alleges Deloitte had actual knowledge of the fraud as early as January 1997 during the audit of Philip's 1996 financial statements, and, nevertheless, permitted the fraud to continue undisclosed for more than a year. ¶¶ 305-318.

The Underwriter Petitioners are sued for their roles in connection with the November 1997 Offering. *Id.* As a result of the underwriters' actions, Philip was able to tap the United States equity market, entice Respondents and thousands of other United States investors and perpetrate a fraud on them by selling now virtually worthless stock at massively inflated prices. United States counsel prepared the November 1997 Offering materials; United States investment banks underwrote the Offering; and the Offering closed in New York. ¶ 17.

As detailed in the Complaint, Philip and the Petitioners are alleged to have perpetrated a massive fraud upon Philip's investors, of whom the vast majority are United States residents. ¶¶ 166-259. In addition to overstating the value of Philip's copper inventory by more than $125 million, Philip was the subject of a pervasive accounting fraud which included the understatement of cost of goods sold, the overstatement and mischaracterization of revenues and earnings, the failure to record material and known liabilities, the overstatement of the value of numerous acquisitions, and the failure to record inter-company transactions properly. Much of this conduct involved Philip's United States subsidiaries, including, among others, Philip's Petrochem facility in South Carolina. ¶¶ 225-33.

Philip's financial condition was fundamentally misrepresented and overstated to the investing public throughout the Class Period. ¶¶ 92-212. The most blatant example of this fraud was Philip's overstated copper inventory. ¶¶ 172-81, 195-201, 207-12. Many of the fraudulent mechanisms used to overstate the Company's inventory and profits involved Philip's customers in the United States, including General Motors, and Philip's United States subsidiaries.

Although conceding the sufficiency of some of the Respondents' claims, in November 1998 the Petitioners filed motions to dismiss the Complaint on various grounds, including the doctrine of *forum non conveniens*.

II. The District Court's Decision

A. Presumption in Favor of Plaintiffs' Chosen Forum

On May 4, 1999, the District Court dismissed the Complaint on *forum non conveniens* grounds. The District Court began its analysis by acknowledging the "'strong presumption in favor of the plaintiff's choice of forum.'" Appendix C, p. 81a (quoting *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). Although recognizing that "'dismissal usually is not appropriate unless the balance of convenience tilts strongly in favor of trial in the foreign forum,'" the District Court stated that the Respondents' choice of forum here was entitled to less weight. Appendix C,

p. 81a (citations omitted). As support for this finding, the District Court stated that Respondents "'have only a small direct interest in a large controversy in which there are many potential plaintiffs, usually in many potential jurisdictions.'" *Id.*

B. Private Interest Factors

After concluding that Ontario was an "adequate alternative forum," the District Court turned to the balancing of the public and private interest factors identified by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Appendix C, p. 92a. With respect to the private interest factors, the District Court concluded that such factors "strongly favor litigation in Ontario." Appendix C, p. 93a. Without crediting Respondents' claims that substantial aspects of the fraud were carried out in the United States and involved companies based here, the District Court determined that "[m]ost of [the fraudulent] activities took place in Ontario" and that "most of the key witnesses and the vast bulk of relevant evidence can be found" in Ontario. *Id.*

With respect to the costs associated with litigation, the District Court determined that Petitioners would incur substantially less costs if trial were held in Ontario, without considering the substantial costs Respondents would incur if forced to litigate there. Appendix C, p. 94a. Although seventeen investment banks and several individual Petitioners have principal places of business or reside in the United States, the District Court made factual determinations about the level of involvement by such Petitioners, and minimized their roles in the fraud before Respondents had an opportunity to conduct discovery. Appendix C, p. 94a.

The District Court flatly rejected the overwhelming connections this litigation has with the United States and deemed Respondents' arguments concerning this obvious nexus merely an "attempt[] to morphose [sic] this case into a dispute that concerns the United States," inexplicably concluding that "this case is about fraudulent conduct and improper record-keeping by a Canadian firm in Canada, and it involves the United States only indirectly or secondarily." Appendix C, p. 96a.

C. Public Interest Factors

With respect to the public interest factors, the District Court found largely that such factors favored neither Petitioners nor Respondents. Appendix C, p. 96a. Barely acknowledging the interests of the United States in adjudicating the rights of United States investors for stock they purchased in the United States on American stock exchanges including the NYSE, through United States stock brokers, the District Court stated merely that such an interest is not a "determinative factor to be considered in weighing convenience." Appendix C, p. 97a-98a. This determination was guided primarily by the District Court's conclusion that the Respondents here engaged in so-called "international transactions" by purchasing on the NYSE or from underwriters located in the United States shares of a public company that regularly filed reports with the SEC and conducted the majority of its business in this country. Appendix C, p. 97a.

Respondents, on July 7, 1999, filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit (the "Second Circuit").

III. The Second Circuit's Reversals of the District Court

A. The First Reversal of the District Court

On November 8, 2000, the Second Circuit reversed the District Court's dismissal in an opinion reported at *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49 (2d Cir. 2000) ("*DiRienzo I*"). The Second Circuit began its analysis by identifying the "ordinarily strong presumption favoring the plaintiffs [sic] chosen forum . . ." Appendix B, p. 31a. After noting that the defendant bears the burden of demonstrating that the plaintiff's chosen forum is not convenient, the *DiRienzo I* court stated "[b]ecause much of the doctrine's strength derives from its flexibility and each turns on its own facts, a single factor is rarely dispositive." Appendix B, p. 32a. The Second Circuit stated that its reviewing power includes "the right to determine whether the district court came to an erroneous legal conclusion or a clearly erroneous factual conclusion" and also to ascertain that the district court "considered all the relevant factors, and whether its balancing of those factors was reasonable." *Id.*

The *DiRienzo I* court agreed with the District Court's conclusion that Ontario offered an adequate alternative forum. After making this determination, the Second Circuit addressed the level of deference afforded plaintiff's choice of forum, recognizing that district courts must — particularly in close cases — defer to plaintiff's choice. Appendix B, p. 38a-39a. The Second Circuit followed this Court's decision in *Koster v. Lumbermans Mutual Casualty Co.*, 330 U.S. 518 (1947), by stating "plaintiffs should not be deprived of their choice of forum, except upon defendants' clearly showing that a trial there would be so oppressive and vexatious to defendant as to be out of all proportion to plaintiffs' convenience." Appendix B, p. 49a. The Second Circuit noted at the outset that the District Court failed to give Respondents' choice of forum adequate deference. Appendix B, p. 43a.

The Second Circuit also stated that the Respondents here "suffered injury in New York and in the United States" and thus, not surprisingly, seek to try the case in a United States forum. Appendix B, p. 41a-42a. The New York forum was chosen because a number of Lead Plaintiffs reside there.[8] Appendix B, p. 41a-42a. In fact, the *DiRienzo I* court stated, "[w]hile the Southern District of New York may not have a strong relationship with all of the plaintiffs, the weight of the class is certainly concentrated in the United States." Appendix B, p. 42a-43a.

In addressing the public interest factors, the Second Circuit determined that the District Court "erred by finding that the local interest factor weighed heavily in favor of litigation in Ontario." Appendix B. p. 44a. Moreover, the Second Circuit found that "the United States has a strong interest in enforcing its securities laws." Appendix B, p. 48a. While observing that Ontario also had an interest in enforcing its laws, the fact that "a small minority of the proposed Class" consisted of Canadian investors vitiated that interest. Appendix B, p. 49a.

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8. Indeed, Lead Plaintiffs Gabriel DiRienzo and Robert Gans are New York residents who filed their initial complaint in their home forum of the Southern District of New York.

With respect to the private interest factors, the Second Circuit found that Petitioners had failed to meet their burden of establishing that trial in the United States would be "oppressive and vexatious." Appendix B, p. 49a. After concluding its analysis, the Second Circuit reversed the District Court's order dismissing the case.

On November 22, 2000, Petitioners filed a petition for rehearing or, in the alternative, rehearing *en banc*. Thereafter, in December of 2001, the Second Circuit issued its decision in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc). In *Iragorri*, the Second Circuit considered "what degree of deference should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." 274 F.3d at 69 (citations omitted). Applying the precedents of this Court, the *Iragorri* court stated:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.

274 F.3d at 71-72. The Second Circuit requested, by Order dated December 18, 2001, that the parties submit letter briefs to address the significance, if any, of the *Iragorri* decision to Petitioners' November 22, 2001 petition for rehearing or, in the alternative, rehearing *en banc*.

B. The Second Reversal of the District Court

On April 1, 2002, the Second Circuit granted the Petitioners' petition for rehearing and issued another opinion, again reversing the District Court, in an opinion reported at

DiRienzo v. Philip Services Corp., 294 F.3d 21 (2d Cir. 2002) ("*DiRienzo II*"). In *DiRienzo II*, the Second Circuit reexamined the degree of deference a district court must afford a plaintiff's choice of forum in light of its *en banc* decision in *Iragorri*. Although recognizing the "substantial deference" afforded a district court's dismissal on the ground of *forum non conveniens*, the Second Circuit cautioned that reversal for abuse of discretion is appropriate where the district court's "decision rests on an error of law . . . or a clearly erroneous factual finding" or that decision "cannot be located within the range of permissible decisions." Appendix A, p. 8a. Importantly, the panel in *DiRienzo II* unanimously agreed on the analysis applied with respect to the deference afforded plaintiffs' choice, the issue on which Petitioners seek review.[9]

The Second Circuit began its analysis by considering the level of deference afforded a plaintiff's choice of forum and recognized that this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) precludes overriding plaintiffs' choice of forum "unless the balance is strongly in favor of the defendant." Appendix A, p. 8a-9a. Looking to its *en banc* decision in *Iragorri*, the Second Circuit noted that district courts should "begin with the assumption that a plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference." Appendix A, p. 9a.

Modifying its analysis in the *DiRienzo I* decision, the Second Circuit considered the District Court's finding that Respondents were entitled to less deference on their choice of forum because they are proceeding in a representative capacity and assumed that the District Court's reasoning was correct. Appendix A, p. 9a-10a. Even assuming, however, that this Court's decision in *Koster* (which the District Court relied on)

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9. Judge Cabranes, who dissented in *DiRienzo I*, dissented in part in *DiRienzo II*. The dissent was limited to his disagreement with the majority over the level of deference afforded to the District Court's balancing of the public and private interest factors. Appendix A, p. 20a-21a.

applied to securities fraud class action litigation as well as derivative actions, the Second Circuit stated: "affording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum," and observed that the District Court "made only [a] passing reference to the weight entitled plaintiffs' choice" of forum. Appendix A, p. 9a.

The Second Circuit then considered whether the plaintiffs' choice was "dictated by reasons that the law recognizes as valid," *id.*, and found that Respondents' choice was driven largely by the facts presented in this litigation: investors in the United States purchased shares of stock traded on the NYSE of a public company who filed reports with the SEC and conducted the majority of its business in the United States. Appendix A, p. 10a. Thus, the *DiRienzo II* court reasoned, United States investors would naturally pursue litigation here. *Id.* Moreover, the Second Circuit noted that Respondents had chosen several different district courts within the United States but that the Southern District of New York was ultimately chosen based on a motion made by certain of the Petitioners to the JPML to have the case heard in New York. Indeed, the JPML ultimately found "[c]entralization . . . in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." Appendix A, p. 11a.

In light of certain of the Petitioners' desire to have the litigation centered in the Southern District of New York, the Second Circuit critically examined Petitioners' later-made claims that New York was profoundly inconvenient.[10] Appendix

10. In their Brief in Support of Motion to Transfer before the Judicial Panel on Multidistrict Litigation, certain of the Petitioners stated "transfer to New York for consolidation or coordination will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." The PSC Parties' Brief in Support of Motion to Transfer, p. 15. The Underwriter Petitioners "adopt[ed] and incorporate[d] . . . by reference" the PSC Parties Brief and similarly stated "New York is by far the most convenient place for the parties to these actions." Response of the Underwriter Defendants in Support of the PSC Parties' Motion to Transfer, p. 6.

A, p. 11a. Thus, the Second Circuit appropriately examined the reasons behind Petitioners' choice of forum. *Id.* Importantly, however, the Second Circuit also determined that the existence of the JPML order was in no way outcome determinative, stating:

> With respect to the complaint being filed in the Southern District of New York, plaintiffs have another reason that the law recognizes as valid: the transfer order of the Judicial Panel on Multidistrict Litigation placed their cases there. Although the consolidated and amended class action complaint was filed after the transfer order – ***and the transfer order, standing alone, is not dispositive or outcome-determinative*** — nothing in the record suggests that this filing was motivated by anything other than this order.

Appendix A, p. 10a (emphasis added).

The Second Circuit agreed with the District Court's determination that Ontario offered an adequate alternative forum to Respondents. Appendix A, p. 11a. The Second Circuit similarly agreed that much of the evidence was in Ontario but noted that Petitioners "failed to explain . . . how transporting the documents or copies of them would be 'oppressive' or 'vexatious.'" Appendix A, p. 12a. Accordingly, the Second Circuit held that "the district court committed a legal error by failing to hold defendants to their burden of proof." *Id.* The Second Circuit also agreed with the district court's factual conclusion that most of the witnesses are located in Ontario but again noted that Petitioners had not made any showing how a 90 minute direct flight between Ontario and New York would be burdensome for witnesses. Appendix A, p. 13a. And finally, while acknowledging the availability of letters rogatory and videotaped depositions, the Second Circuit found the district court had not abused its discretion in finding that the inability to compel third-party witnesses to appear for trial in the United States weighed in favor of Petitioners. Appendix A, p. 13a-14a.

In sum, the Second Circuit found that the balancing of the private interest factors was "close," a finding which did not support dismissal because of *Gilbert*'s mandate that "unless the balance strongly favors defendant, plaintiffs' choice of forum should rarely be disturbed." Appendix A, p. 14a (citation omitted).

In addressing the public interest factors, the Second Circuit found that these factors favored Respondents. The Second Circuit determined that the local interest heavily favored the United States and concluded that the District Court's determination to the contrary was "clearly erroneous" because:

> [i]t fails to acknowledge as a factual matter that plaintiffs' amended complaint alleges the majority of their securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American Stock exchanges. For example, plaintiffs claim that nearly 80 percent of Philip's shares sold during the class period were traded on exchanges in the United States.

Appendix A, p. 15a.

Further, the Second Circuit rejected the notion that Respondents here engaged in "international transactions." Indeed, the *DiRienzo II* court determined that this finding, and the District Court's conclusion that the United States interest in the litigation was insignificant, precluded a reasonable balancing of the *Gilbert* factors, thereby pushing the District Court's decision outside the "permissible range of decisions." Appendix A, p. 17a-18a. With respect to the United States' interest, the Second Circuit stated:

> A strong public interest favors access to American courts for those who use American securities markets. The fraud on the market theory itself illustrates investors' reliance on accurate and complete information. For securities markets to function efficiently, securities fraud law must be clear and enforceable. As the statute explaining the need

> for regulation and control of transactions in securities exchanges and over-the-counter markets states, these transactions are affected with a national public interest. Thus, those laws must also be applied consistently with regard to the significant majority of the putative class members who bought their securities on American markets.

Appendix A, p. 18a (citations omitted).

In light of the foregoing and the Petitioners' "failure to show oppressiveness and vexation out of all proportion to plaintiffs' convenience" — as required by *Koster* — the Second Circuit found that the District Court "erred as a matter of law when granting the motion to dismiss this case in favor of it being brought in Canada." Appendix A, p. 19a. Relying on this Court's decisions in *Piper* and *Koster*, the Second Circuit appropriately stated:

> Consequently, although defendants may have shown Canada to be *an* appropriate forum, they have not met their burden of proving that litigation in the United States is unnecessarily inconvenient for them to a degree much greater than the convenience that would be afforded plaintiffs by trial in the Southern District of New York.

Appendix A, p. 19a (emphasis added).

Petitioners again filed a petition for rehearing *en banc* to the Second Circuit. On June 13, 2002, the Second Circuit denied the petition for rehearing *en banc*. The instant petition for certiorari followed.

ARGUMENT

I. This Court's Long-Standing Precedents Firmly Establish That Parties' Motives Are Highly Relevant To Determining The Amount Of Deference Owed To A Plaintiff's Choice Of Forum

Petitioners seek review asserting that the decision below is contrary to this Court's holdings in *Gilbert* and *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). In so arguing, Petitioners mistakenly contend that the Second Circuit's "subjective motives-based approach to determining the deference owed to the plaintiff's choice of forum" (Pet. at 20.) somehow establishes a novel approach for determining *forum non conveniens* motions.

Yet, in both *Gilbert* and *Piper*, this Court used a motives-based analysis in determining what deference to accord a plaintiff's choice of forum. Consequently, neither *DiRienzo II*, nor *Iragorri*, represents any departure from this Court's traditional *forum non conveniens* jurisprudence. The decision below is in full accord with this Court's precedents.

Gilbert established the strong presumption that "the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508. But *Gilbert* also noted the role of the trial court with respect to *forum non conveniens* included "resist[ing] imposition upon its jurisdiction . . . those who seek not simply justice but perhaps justice blended with some harassment." *Id.* at 507. Turning its eye directly toward the plaintiff's motives in filing suit in the forum at issue, the *Gilbert* court held that "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." *Id.* This Court in *Gilbert* looked to the motives as to why the plaintiff filed suit in the chosen jurisdiction in determining whether the plaintiff was entitled to the usual presumption that the plaintiff's forum choice rarely be disturbed. Indeed, the Court noted that the plaintiff

was unable to even make a "showing that the present forum serves any convenience of his own . . ." 330 U.S. at 509.

In *Piper*, this Court confronted the express question of the deference afforded the plaintiff on a *forum non conveniens* motion. 454 U.S. 235. That case involved an airplane crash in Scotland where the pilot and five passengers died. *Id.* at 239. The decedents were all Scottish subjects. A California probate court appointed respondent, Gaynell Reyno, as the administratrix of the estate of the five deceased passengers. Reyno commenced suit in her home district, which was ultimately transferred to the Middle District of Pennsylvania. *Id.*, at 238. Although the Court reaffirmed the principle that "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . ." the Court looked at who the real parties in interest were — the Scottish decedents — and found that a foreign plaintiff's choice of forum deserves less deference than that of the domestic plaintiff. *Id.* at 265-66.

Confronted with a foreign plaintiff's action brought in the United States for the sole reason that U.S. law was advantageous, the *Piper* court first validated its pre-*Gilbert* decision in *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932), which affirmed a district court's dismissal on grounds of *forum non conveniens*. *Piper*, 454 U.S. at 247. That case likewise involved foreign plaintiffs who, this Court noted, chose a U.S. forum "in large part because the relevant American liability rules were more favorable than the Canadian rules." *Id.*

Piper seized upon *Canada Malting*'s measure of plaintiff's motives in choosing a U.S. forum stating, "the central focus of the *forum non conveniens* inquiry is convenience . . ." *Piper* at 249. The normally strong assumption that plaintiff's choice of forum stands is lessened, and "dismissal will ordinarily be appropriate where the plaintiff is unable to offer any specific *reasons of convenience* supporting his choice." *Id.* (emphasis added). Thus, in *Piper* this Court placed heavy emphasis on plaintiff's motives, finding such analysis necessary "where a plaintiff chooses a particular forum, not because it is convenient,

but solely in order to harass the defendant or take advantage of favorable law." *Id.* at n.15.

The Second Circuit's test for the level of deference to be accorded a plaintiff's choice of forum is entirely consistent with *Gilbert* and *Piper*. The common thread of *Gilbert* and *Piper* is whether the plaintiff has a legitimate reason, a reason of convenience, in bringing the action in the chosen forum. If so, then the plaintiff's forum choice should rarely be disturbed. Below, the Second Circuit articulated a standard by which to measure the motives behind the plaintiffs' filing of the lawsuit in the chosen forum, finding that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." In measuring those motives in this case, the Second Circuit found that:

> [P]laintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws. We recognize that this interest is not outcome-determinative in the weighing of relevant factors, but it nonetheless demonstrates a "bona-fide" connection to the United States, that is, a valid reason. Further, considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States — as well as the claim that most plaintiffs conducted their stock transactions within the United States — a legitimate interest exists in trying this securities fraud litigation here. The SEC reiterated that point in a post-*Iragorri amicus* letter to the Court.

DiRienzo II, 294 F.3d at 28.

Thus, the Second Circuit's decision was faithful to this Court's decisions in both *Gilbert* and *Piper*. There is no need for review by this Court.

A. There Is No Conflict Between The Second Circuit's Decision and The Decisions of Other Circuit Courts

Petitioners contend that the Second Circuit's decision is in conflict with all the other Circuits, and therefore, review is warranted. According to Petitioners, only the Second Circuit employs a "subjective motives-based" "sliding scale" test to determine the deference owed to a plaintiff. In contrast, Petitioners contend, each of the other Circuits employs a bright-line "objective status-based" test. Pet. at 20.

According to Petitioners, courts are to employ a bright-line test to determine the level of deference owed to the plaintiff: if the plaintiff is a forum resident suing in an individual capacity, then full deference is accorded the forum choice. If, however, the plaintiff is foreign, or suing in a representative capacity, then limited deference applies. *Id.* Yet Petitioners' articulation of the "proper test" of what level of deference is afforded a plaintiff on a *forum non conveniens* motion is actually at odds with both *Gilbert* and *Piper* and would require this Court to overturn these long-standing precedents.

In *Piper*, this Court looked beyond the fact that the named plaintiff was a U.S. citizen and instead looked to the "real parties in interest" to determine what degree of deference was owed to the plaintiff. 454 U.S. at 255. Under Petitioners' articulation of the standard to be employed, however, this Court would have been required to simply determine that, because plaintiff Reyno sued in her home forum, full deference was to be applied to her choice of forum.

Moreover, as detailed above, both *Gilbert* and *Piper* were concerned with the motives underlying plaintiff's choice of forum. Petitioners, however, reject this Court's long-standing application of a motive based analysis and suggest in its place a formulaic test: when a plaintiff sues in his home forum, full deference applies, regardless of the reason why that forum was selected. Petitioners seek to deprive district courts of the "flexibility" of the *forum non conveniens* analysis that this Court has found to be "so valuable." *Piper*, 454 U.S. at 250.

In advocating review by this Court, Petitioners strain to create a conflict where none exists. Indeed, no other Circuit has considered the Second Circuit's decision in either *DiRienzo II* or *Iragorri* and there simply is no conflict for this Court to resolve. A careful reading of the cases cited by Petitioners to demonstrate this so-called conflict — *Alpine View Co. Ltd. v. Atlas Copco*, 205 F.3d 208 (5th Cir. 2000) and *Leon v. Million Air Inc.*, 251 F.3d 1305 (11th Cir. 2001) — shows that none exists.

In *Alpine View*, the Fifth Circuit affirmed the district court's grant of a *forum non conveniens* motion in an action brought in Harris, County Texas (and subsequently removed to the Federal District Court) by two Swedish holding companies against two Delaware corporations, one with its principle place of business in Massachusetts and the other in New York. 205 F.3d at 211-12. The action arose concerning a business contract providing that any dispute was required to be arbitrated in Oslo, Norway. *Id.* The sum total of the Fifth Circuit's discussion of the degree of deference to be afforded the plaintiffs is as follows: "Appellants recognize that, as foreign plaintiffs, their initial choice of forum merits less deference than courts typically give to such decisions." *Id.* at 222 (citing *Piper*, 454 U.S. at 255).

In *Leon*, the Eleventh Circuit (in an opinion authored by the Hon. Jon O. Newman, sitting by designation from the Second Circuit) affirmed the dismissal of a tort action under the doctrine of *forum non conveniens*. There, citizens of Ecuador brought suit in Florida concerning a plane that crashed in Manta, Ecuador immediately after take-off and which killed a number of plaintiffs' relatives. Defendant was headquartered in Florida. 251 F.3d at 1305. The court's discussion of the deference afforded the plaintiff's forum choice consists of the following: "However, the presumption that a plaintiff has chosen a sufficiently convenient forum 'weakens' when the plaintiff is a foreigner litigating far from home and in such cases plaintiff's forum choice is accorded 'less deference'." *Id.* at 1315 (citing *Piper*, 454 U.S. at 255).

Petitioners also assert that the Second Circuit's employment of a "sliding scale" approach is inconsistent with other precedent. Petitioners maintain, "courts give either *full* deference, as in *Gilbert*,[11] or *limited* deference, as in *Koster* and *Piper*." Pet. at 20. Yet this is precisely what the Second Circuit did in *DiRienzo II* when it afforded the plaintiffs "less deference" because they sued in a representative capacity but found that even affording the plaintiffs limited deference "does not mean that they are deprived of all deference in their choice of forum." Appendix A, p. 99. In fact, *Leon* affirms that this is precisely what other Circuits do. 251 F.3d at 1315 (lower court still accorded "Plaintiffs' forum choice at least the diminished presumption of convenience to which it is entitled . . .").

B. The Second Circuit's Decision Neither Double Counts Factors Nor Does It Predetermine the Outcome of *Forum Non Conveniens* Motions

Petitioners' contention that the Second Circuit's decision causes factors to be "double counted" is also meritless. Under the framework established by this Court in *Gilbert* and *Piper*, courts are to first determine the degree of deference owed to the plaintiff and then determine whether the public and private interest factors weigh in favor of transfer. It requires district courts to analyze the proper degree of deference to be accorded the plaintiffs' forum choice and then weigh the public and private interest factors to determine whether the weight of these factors, counter-balanced by the deference afforded the plaintiff, is sufficient to support dismissal. The Second Circuit approach follows this analysis. It took into account the appropriate degree of deference at each stage of the balancing analysis because that is what a balancing test requires — a continual comparative weighing of factors. This is not "double-counting."

As this Court did in *Piper* and *Gilbert*, the Second Circuit in *DiRienzo II* recognized that the degree of deference is a material factor in the balancing process. First it determined that

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11. In *Gilbert*, this Court gave limited deference to plaintiff's choice of forum.

the lower court erred by not affording the plaintiffs even the lower deference they deserved, even assuming that the district court properly interpreted this Court's decision in *Koster*. *See* Point II, *infra*. On the private interest factors, the Second Circuit found that "on the evidence presented, we think the balance of the private interest factors is close."[12] Appendix A, p. 14a. With regard to the public interest factors, the Second Circuit found the lower court's conclusion that the these weigh "heavily in favor of . . . Ontario" (Appendix A, p. 97a) to be "clearly erroneous" because it "fails to acknowledge as a factual matter that plaintiffs' amended complaint alleges the majority of their securities transactions were conducted in the United States, by Americans, in American dollars, on American Stock Exchanges." Appendix A, p. 15a-17a

In sum, the Second Circuit reversed because the district court's dismissal failed to accord any deference to plaintiffs' forum choice considering the "relatively even balance among the private interest factors" and that "the public interest factors favored an American forum." Appendix A, p. 19a.

In addition, while Petitioners take issue with the Second Circuit's noting of their possible forum shopping motives below, other Circuits do the same and even weigh this consideration more heavily. For example, in *Pain v. United Tech. Corp.*, 637 F.2d 775 (D.C. Cir. 1980), the DC Circuit looks not only to the plaintiff's but the defendant's forum shopping motives when reviewing a lower court's *forum non conveniens* analysis. "In short, trial judges applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum shopping by either litigant at the expense of the other." *Id.* at 784.

Finally, Petitioners' assertion that *DiRienzo II* will always result in transnational classes being anchored in the United States is spurious. *DiRienzo II* merely applies the holdings of *Gilbert*

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12. Thus Petitioners' claim that the Second Circuit resolved the private interest factors in favor of Respondents misstates the lower court's holding.

and *Piper*, as recently examined by the Second Circuit in *Iragorri*, to the facts of this case. A different set of facts — for example, if a foreign issuer did not have the level of United States contacts that Philip did — might lead to a different result under the same analytical framework. In contrast, if Petitioners' interpretation of *Gilbert*, *Piper*, and *Koster* were to apply, or if such securities purchases were to be deemed international transactions as held by the District Court, foreign issuers of securities would always be free to escape the reach of United States laws for harm caused to United States citizens from their purchases of securities in the United States. This is surely not the result intended by this Court's prior *forum non conveniens* rulings.

II. Review Is Not Warranted Here As There Is No Conflict Over The Deference Owed To A Securities Class Action Plaintiff's Choice of Forum

A. *DiRienzo II* Did Not Decide The Question of Whether *Koster* Requires Diminished Deference For The Choice of Forum of A Class Action Representative

Petitioners' second argument for review is premised on the following misstatement of the holding of the court below:

> [t]he court below declined to follow this Court's holding in *Koster*, opting instead to follow its own holding in *Iragorri*. . . . Despite respondents' status as class representatives, the court below afforded respondents' choice of forum full undiminished deference under *Gilbert*. . . .

Pet. at 26.[13] The court below did no such thing.

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13. Respondents note that *Koster* involved the issue of transfer between district courts within the United States. This type of transfer motion is now governed by 28 U.S.C. § 1404, enacted by Congress in 1948, one year after this Court's decision in *Koster*. Thus, the facts in *Koster* would no longer give rise to a motion to dismiss on grounds of *forum non conveniens*, but would instead be addressed in the context of

(Cont'd)

After explicitly vacating that portion of the *DiRienzo I* decision in which the majority disagreed with the District Court's interpretation of *Koster*,[14] *DiRienzo II* held that "even were the district court correct" in its interpretation of *Koster*, "[a]ffording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum. The trial court, however, after interpreting *Koster*, appears to have made only passing reference to the weight entitled plaintiffs' choice." Appendix A. p. 9a. Therefore the Second Circuit applied *Koster* precisely in the manner Petitioners argue it should be applied — providing diminished deference to Class plaintiffs' choice of forum. Accordingly, review is unnecessary.[15]

The Second Circuit also viewed petitioners' *forum non conveniens* motion with skepticism because "the defendants' current claims of inconvenience raise questions as to their underlying motives." Appendix A, p. 11a. In particular, the Court questioned why the petitioners argue the inconvenience of litigating in a forum which they had previously found quite convenient for the advancement of their business objectives. *Id.*, 10a ("considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States"); *see also Iragorri*, 274 F.3d at 75 ("Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of

(Cont'd)

a § 1404(b) change of venue motion. *See Piper*, 454 U.S. at 264-265 (district courts have less discretion to dismiss under forum *non conveniens motions* than under § 1404 transfer motions).

14. Thus declining to decide the question of whether the *Koster* exception applies to class action representatives. Appendix A. p. 9a.

15. Petitioners' arguments regarding *Koster* are inherently inconsistent. They argue, incorrectly, that review is warranted because the Second Circuit did not follow *Koster*. Yet, they also concede that this "Court has not addressed the application of *Koster* to class actions." Pet. at 29.

forum non conveniens not because of genuine concern with convenience but because of similar forum-shopping reasons."). As discussed in more detail below, one of the principle concerns behind the development of the doctrine of *forum non conveniens* is to prevent unfair forum shopping. "[I]t is not a legitimate advantage to a plaintiff to vex his opponent." *Koster*, 330 U.S. at 535. *See also* Point I, *supra*.

B. There Is No Conflict Among the Circuits Over the Level of Deference to Be Afforded To A Securities Class Representative's Choice of Forum

Petitioners' second argument for review is also premised upon the unsupported assertion that the lower courts are divided on the issue of the application of *Koster* to securities class actions or that there exists an important and unresolved issue of federal law. Although Petitioners cite several District Court cases in support of their conflict argument (Pet. at nn.14-15), none of the cases cited are Circuit Court decisions. It would thus appear that, with the exception of the Second Circuit's decision in *DiRienzo II*, none of the federal Circuits has even considered the issue of whether the *Koster* exception of diminished deference must be extended to securities class action litigation. Without evidence of a conflict among the decisions of the federal circuits, there is no justification for this Court's review of the decision below. *See Taylor v. United States*, 493 U.S. 906, 907 (1989). Moreover, even if conflicting decisions of the District Courts were sufficient evidence of an unresolved important federal question, the cases cited by Petitioners (Pet. at n.14.) do not demonstrate any conflict over this issue.

For example, the first case cited by Petitioners is not a securities class action and the plaintiffs therein were divided over the issue of transfer. The plaintiffs in *Barney v. State of Alabama*, 171 F. Supp. 2d 1292 (S.D. Ala. 2001) had brought two separate actions challenging the defendants' decision not to redistrict Alabama's congressional election districts based upon the results of the 2000 census. Noting that one of the plaintiffs had agreed to the transfer, the court decided to transfer

both cases to the Middle District of Alabama where another case challenging the failure to redistrict was already pending.

The remaining cases cited by Petitioners involving class litigation under the federal securities laws fall short of squarely addressing any *Koster* based requirement of diminished deference to plaintiffs in securities class actions. In *Rosen v. Fidelity Fixed Income Trust et al.*, Civ. A. No. 95-2365, 1995 WL 560037 (E.D. Pa. September 20, 1995) the court noted the decision in *Koster* (*id.* at *8), but also acknowledged the merit of plaintiff's argument that the venue provisions of the Securities Act manifest a congressional intent to provide securities plaintiffs with the broadest possible choice of venue. *Id.* at *10. Ultimately, the court avoided the issue of deference. "[E]ven if the broad venue provision were entitled to no weight, I conclude that, even minimal consideration to Plaintiff's choice of forum, when considered with the other factors that bear on the issues of convenience and fairness, dictates that this action remain here." *Id.* at *10-11.[16]

16. The court in *Job Haines Home for the Aged v. Young et al.*, 936 F. Supp. 223 (D. N.J. 1996) also considered plaintiff's arguments regarding the broad venue provisions of the Securities Act but found defendants had demonstrated "hands down" that the case should be transferred *Id.* at 231 ("[E]ven if the Court were to conclude that plaintiff's choice of forum were entitled to substantial deference, these factors weigh sufficiently in favor of a transfer to override any such preference.") The court in *Guenther v. Cooper Life Sciences, Inc.*, Civ. A. No. 4-88-503, 1998 WL 131340 (D. Minn. Dec. 5, 1988) likewise determined that the transfer decision was not a close one and would have been the same regardless of the level of deference given plaintiff's choice of forum. *See Guenther* at n.8. In the two remaining cases cited by Petitioners, the courts found ample reason to question plaintiffs' claims of convenience regarding their chosen forum. *See Hoefer v. United States DOC*, No. C 00 0918 VRW, 2000 U.S. Dist. LEXIS 9299, at *9 (N.D. Ca. June 28, 2000) (only one of named plaintiffs lived in California; three others lived in the proposed transferee forum where plaintiffs' counsel previously instituted similar lawsuit); *Blake Construction Co., Inc. v. International Harvester Co.*, 521 F. Supp 1268, 1269 (N.D. Ill. 1981) (plaintiffs in two of five pending actions had joined in defendants' motions for transfer).

C. *Koster* Does Not Preclude Giving Full Deference To A Securities Class Action Plaintiff's Choice of Forum

Petitioners argue that the diminished deference standard applied to a derivative plaintiff's choice of forum in *Koster* applies to any plaintiff acting in a representative capacity. Yet, *Koster* cautions that there is no "rigid rule to govern discretion" and that "the doctrine of *forum non conveniens* . . . resists formalization and looks to the realities that make for doing justice." 330 U.S. at 528. The court then cites with favor the decision in *Williams v. Green Bay & Western R. R.*, 326 U.S. 549 (1946), "a class suit brought to recover amounts alleged to be due to plaintiffs on debentures," in which the Supreme Court reversed the trial court's dismissal on *forum non conveniens* grounds. *Koster*, 330 U.S. at 528 (citing *Williams*, 326 U.S. at 557-60). *Koster* thus acknowledged the significant differences between representatives of derivative actions and class actions.

The forum in which a class action litigation is conducted does bear responsibility for certain administrative tasks in addition to its adjudicative function. *See Koster*, 330 U.S. at 525 (discussing approval of settlement, providing notice to class, and fixing attorneys' fees). However, *Koster* goes on to explain that these additional tasks require consideration of the forum's relationship to the whole group that plaintiff represents in order to determine the more appropriate forum.[17] In *Koster*, the real party in interest was the corporation; thus, the corporation's home forum had the closest connection to it, rather than the forum in which plaintiff resided. Here, the vast majority of the Class members represented by plaintiffs are U.S. citizens.

17. Petitioners argue that these administrative burdens demonstrate similarity between class and derivative actions. Pet. at 27. But petitioners misapply the analysis in *Koster*. Because a Canadian forum bears little relationship to the U.S. investors who make up the vast majority of those damaged by defendants' alleged fraud, the *Koster* analysis on this factor favors the U.S. forum as the more appropriate forum to take on these administrative responsibilities to the Class.

Thus it is the U.S. forum that has the most direct relationship to the Class and can most properly be made responsible for the administrative burdens of the class action.

D. *Iragorri* and *DiRienzo II* Follow The Principles of *Forum Non Conveniens* Enunciated in *Koster*

Koster — like *Gilbert* and *Piper* — firmly establishes that the motives of the parties in choosing a forum are among the primary factors to be considered by the courts when faced with a motion for dismissal under *forum non conveniens*. Indeed, this Court's decision in *Koster*, after noting the plaintiff's failure to specify how he would be inconvenienced if the litigation were transferred, and the unlikelihood of inconvenience to the plaintiff due to his status as a figurehead representative of a derivative case, rests primarily upon the Court's determination that plaintiff had made no showing that his choice of forum was based upon his convenience. Instead, it appeared that the forum had been chosen for purposes of "harassment" and to place the defendants at a disadvantage.

> We hold only that a district court, in a derivative action, may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses so little countervailing benefit to himself in the choice of forum as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.

Koster, at 531-32. Thus, the plaintiff was not entitled to the usual level of deference accorded a plaintiff with more legitimate motives. *See* Point I, *supra*.

Like the Court's decisions in *Gilbert* and *Piper*, the primary considerations that influenced the Court in *Koster* to give little weight to a derivative plaintiff's chosen forum are not present here where the issue is whether a class of U.S. investors should be deprived of an American forum to litigate their claims under the federal securities laws against a foreign issuer who registered

and sold its securities on the U.S. markets. In *Koster*, the Court viewed the plaintiff in the derivative case as a "mere phantom plaintiff with interest enough to enable him to institute the action and little more," *Koster*, at 525, because he lacked any real financial incentive to pursue the litigation absent unique procedural advantages of derivative actions. Under these circumstances, *Koster* considered the plaintiff as interchangeable with "hundreds of potential plaintiffs, all equally entitled to invest themselves with the *corporation's cause of action* and all of whom could with equal show of right go into their many home courts." *Id.* at 524 (emphasis added).

In this action, however, Respondents are the real parties in interest, who assert direct, personal claims against the Petitioners, and seek to recover substantial damages on their own behalf. Their adequacy to represent the Class, the typicality of their claims as compared to others in the Class, and their reliance on the misrepresentations of the Petitioners, are all at issue in this litigation. In contrast, the derivative plaintiff stands in the shoes of the corporation and sues to enforce a corporate right. His participation in the litigation is thus limited to proof of ownership of corporate securities to establish standing. *See Koster* at 525.

And unlike the derivative claims in *Koster*, which were governed by state law, this action involves issues of *federal* law alone, namely, violations of the Securities Act and the Exchange Act. These federal securities laws also provide additional support for distinguishing between representatives in derivative and securities class action litigation in light of the provisions of the PSLRA and the significant financial stake of the Lead Plaintiffs in this litigation. As noted above, respondent Bruce Toll's $6.4 million investment in Philip, and respondent Robert Gans' investment of more than $3.5 million, have become essentially worthless. The PSLRA has eliminated the type of interchangeable nominal plaintiff involved in *Koster* and replaced it with a system where plaintiffs with millions of dollars of losses have taken over the leadership mantle.

The fact that United States citizens with millions of dollars in individual losses have been in the forefront of the leadership in this case from its inception attests to the success of the PSLRA in attracting sophisticated and involved plaintiffs who can better protect the interests of other investors. The presumption in favor of these plaintiffs to have their federal securities claims tried in their home forum should not be lost simply because, in addition to seeking personal remuneration, they also choose to pursue a remedy for a class of similarly defrauded United States investors. If anything, because the objective is justice and fairness, *see Koster* at 528, such plaintiffs are arguably entitled to even greater deference in their choice of forum.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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